Filed 4/2/12 Marriage of Kahn CA1/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of BARBARA KAHN and MELVIN KAHN.	
BARBARA KAHN, Appellant, v. MELVIN KAHN, Respondent.	A128001 (Alameda County Super. Ct. No. RF08412139)

Barbara Kahn appeals from the judgment dissolving her marriage to Melvin Kahn. Barbara argues that the court erroneously: (1) failed to apportion to her interests in Melvin's separate properties based on community services rendered to those properties; (2) denied her reimbursement for community property payments made for the benefit of his separate properties; and (3) granted him reimbursement for his equity in a separate property that was transmuted to community property during the marriage. Her other principal contention is that the judge should have been disqualified for bias. Her arguments lack merit and we affirm the judgment.

I. BACKGROUND

Barbara, presently 82 years old, and Melvin, who is 91 years old and has been blind since age 19, were married for almost 48 years. She petitioned for separation in September 2008, he responded and requested dissolution of the marriage.

The parties had no significant assets other than these properties in Alameda: (1) a commercial rental property at 2319 Santa Clara Avenue (hereafter Santa Clara Avenue); commercial rental spaces at 473 and 475 Central Avenue, and a six-unit apartment complex at 1407 Fifth Street (collectively Fifth Street); their residence at 467 Central Avenue (Home); a garage and workshop at 469 Central Avenue (Garage Lot); and residential rental units at 1411, 1413, and 1415 Fifth Street (the Victorian).

Melvin acquired Santa Clara Avenue and Fifth Street before marrying Barbara in 1960. The Home and Garage Lot were purchased in 1963, with Melvin taking title in his name "as his separate property." The Victorian was purchased in 1969, with Melvin taking title in his name as "a married man." In 1991 and 1992, Melvin executed deeds to the Home and Victorian to himself and Barbara, "husband and wife as joint tenants." Melvin did not dispute that the Home and the Victorian were community property, but maintained that Santa Clara Avenue, Fifth Street, and the Garage Lot were his separate property. Barbara argued that the latter three properties were transmuted to community property during the marriage.

The issues in the case were tried in three phases. The first phase, submitted on documentary evidence, addressed whether Santa Clara Avenue, Fifth Street, or the Garage Lot remained Melvin's separate property. The court found that these properties had been transmuted to community property by an agreement the parties executed in May 2005.

Appraisers appointed by stipulation of the parties reported on the properties' current values and their values when they were transmuted. The values at the time of transmutation were: on May 17, 2005 Santa Clara Avenue was worth $800,000, Fifth Street was worth $1,200,000 and the Garage Lot was worth $240,000; on September 11, 1991 the Home was worth $240,000; and on September 14, 1992 the Victorian was worth $300,000. As of July 2009 Santa Clara Avenue was worth $950,000, Fifth Street was worth $1,200,000, the Garage Lot was worth $150,000, the Home was worth $480,000, and the Victorian was worth $550,000 for a total aggregate value of $3,330,000. The

Home was considered to be "underwater" because it was encumbered by mortgages totaling $515,000.

The second phase of the trial considered the presumption of undue influence applicable to interspousal transactions that favor one of the spouses. Testimony was taken as to whether Melvin had entered into the 2005 community property agreement freely, with knowledge of the facts, and an understanding of the transaction.

Evidence submitted on the undue influence issue included the declaration of attorney Michael Ferguson, who prepared the 2005 agreement and notarized the parties' signatures to it. Ferguson's notes of a meeting with the parties in 2003 showed that they wanted an agreement confirming that all their property was community property. Ferguson declared that Melvin did most of the talking at the meeting and gave most of the instructions. Ferguson had "absolutely no doubt that [Melvin] signed [the community property agreement] in my presence, and that he knew what he was signing when he signed it." Ferguson testified that he did not read the agreement to Melvin on the day it was executed, but noted that he had sent the document to the parties two years before they signed it, and said that he "would be stunned" if no one had ever read it Melvin.

Melvin testified that he was not aware of the community property agreement until after Barbara filed for separation. He did not sign the agreement because the signature consisted of the letter "M," and he never executed documents with his initials. He did not know why he and Barbara met with Ferguson, and he did not tell Ferguson that he wanted a community property agreement. His relationship with Barbara deteriorated beginning in 2000, when she refused to let him touch her because he would not change his separate property to community property. Around the time they met with Ferguson, she was threatening to divorce him over the property he held as separate property. He worked "14, 19 hours a day" earning the money to buy Santa Clara Avenue and Fifth Street before he got married, and "those two buildings I said to myself will always be mine." He feared that Barbara would "load[] up" the properties with debt if they became community property.

Melvin had moved out of the Home in September 2008, and moved back in November 2008. He testified that he tape recorded all of his meetings with attorneys, and kept the tapes in locked drawers in his locked home office. When he was allowed access to the Home to retrieve personal effects while he was living away, he discovered that these tapes were gone, along with all of his legal documents.

Barbara testified that she was not threatening Melvin with divorce when they consulted Ferguson in 2003. She testified, consistent with Ferguson's notes, that they told him they had for a long time treated what had been Melvin's separate property as community property. She said that Ferguson read the community property agreement to Melvin.

In its statement of decision on the undue influence issue, the court found that Melvin's testimony was not credible in numerous respects. The court wrote that whether Melvin knowingly assented to the community property agreement "comes down to credibility, and on this point [Melvin] 'has issues.' For example, the court finds his denial of Ferguson's account of their initial meeting (supported by contemporaneous notes) to be not credible. Similarly, the account of other witnesses as to how Ferguson was initially identified is far more credible than [Melvin's] claim that [Barbara] 'dragged' him there. The court finds [Melvin's] claim of a therapist counseling him to 'out-shout' his wife not credible, as well as his remembrance of November 21, 2007, as the date he acted on this advice. His disagreement with the testimony of his neighbor that it was his voice that was repeatedly heard yelling over his wife's more muted protestations was also not credible. The court finds his testimony regarding [Barbara's] withdrawal of affection in the 2000-03 period not credible in light of the contemporaneous family trips to Florida, Spain, etc. and the observations of other witnesses. The court finds his testimony that he never cut his wife off financially to be false in light of the testimony of his wife and others that he cancelled credit cards and otherwise blocked her access to bank accounts and the like. The court finds his testimony that he has been cut off from his grandchildren and misses them terribly to be not credible in light of his subsequent admission that he has never once tried to call them. The court finds incredible [Melvin's]

claim to have taped – only to have [Barbara] destroy – all of the interviews he had with various probate attorneys over the years when he never called a single one of these attorneys to testify that they recall such taping. Because of these and other peculiar features of [Melvin's] testimony, a very dark cloud is cast over his entire account of the marriage and the history of the 2005 Agreement."

The court went on to find that Melvin was "indeed a master of control," and that "[g]iven his intelligence, sophistication and experience, it is inconceivable that he would sign the 2005 Agreement without knowing *exactly* what it said. . . . [T]here is no doubt that his execution of that agreement was a very deliberate and fully informed act on his part and that his trial testimony was false." The court thus concluded that Barbara had rebutted the presumption of undue influence that arose from the benefit she received from the agreement. The agreement was therefore enforceable, and Santa Clara Avenue, Fifth Street, and the Garage Lot were confirmed to have been transmuted to community property in May 2005.

Following unsuccessful attempts at settlement when the parties were assisted by the trial judge, the court filed a trial setting order that stated: "The court assumes that both parties are aware that a trial in this matter will result in higher fees and probably the sale of more properties than might otherwise be possible through settlement and that such a sale will result in substantial capital [gains] taxes that could otherwise be avoided. The net result will be fewer resources than would otherwise be available to sustain these two parties in their final years. If they must each eventually live in reduced circumstances than might have been the case if they had settled, they will have only themselves to blame. This trial will have no winners."[1] The court made similar remarks in another order filed a few days later.

[1] The court had previously observed: "Whatever the outcome on property, the net result of the litigation will be either a roughly equal division of property or an unequal division coupled with a spousal support award leaving them in comparable circumstances in terms of income. The only possible purpose of the litigation is to determine who will have testamentary control of the bulk of the assets. If they have different objectives in

Melvin filed an income and expense declaration listing monthly income of $2,000 and monthly expenses of $10,110. Barbara filed an income and expense declaration listing monthly income of $2,645 and monthly expenses of $4,067. The parties' income consisted of net rents from the Alameda properties, which were being split 55 percent to Barbara and 45 percent to Melvin. Apart from $1,000 in cash listed by Melvin, the parties listed no assets other than the Alameda properties. Melvin stated that he had paid his attorneys $34,000 and owed them an additional $91,000. Barbara stated that she owed her attorney over $93,000.

When the issues of division and reimbursement were tried in September 2009, the parties stipulated to admission of the declarations filed and testimony taken at the trial on undue influence. Barbara had lodged a declaration stating that she left her career as a social worker when the children were born and thereafter "worked full time on our real estate properties. I always did the books, because [Melvin] is blind. I was the one who would place the ads to get tenants, collect their deposits and rent, deposit everything into our joint accounts, pay all of the bills, organize big repairs, and make smaller repairs either by myself, or with [Melvin] trying to help me by giving me suggestions or instructions. For a number of years [Melvin] and I had a Laundromat business at [Fifth Street], and I used to have to collect the monies from the machines, deposit them into our joint account, and haul the washers out of their spots to get behind them to make repairs. [Melvin] often understood what was wrong and could visualize it in his mind and tell me what to do. We were a partnership." Barbara testified at the trial that she stopped working as a social worker in 1963, and that she worked 20 hours per week on the laundry business from 1961 until it was sold in 1981. She was never compensated for her work on the rental properties or the laundry.

James Mills, a forensic economist, testified for Barbara that she provided $786,496 in services to Melvin's separate properties from 1961 up to the time they were transmuted in 2005. He assumed that she worked 40 hours per week on the rental

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that regard, a settlement could be structured that would allow each of them some measure of control. [Instead,] the estate is rapidly being consumed by attorney's fees."

properties, and allocated 10 hours of her time to each of four job categories: property and real estate manager; janitor and cleaner; maid and housekeeper; and maintenance and repair. Using government-compiled wage statistics for the categories, he determined that a person performing those services would have made $38,539 in 2008. He then adjusted the 2008 earnings for inflation to come up with the total in services for the years in question. Mills valued Barbara's services to the laundry business at $78,438, based on assumptions that she worked for the business 20 hours per week from 1961 to 1981, and spent 10 hours each week as a laundry/dry cleaner worker and 10 hours as a home appliance repairer.

Mills calculated various rates of return for Santa Clara Avenue and Fifth Street from 1961 to 2005 based on the $66,000 value Barbara gave him for those properties in 1961. He determined that statutory interest yielded a higher rate of return during this period than the average 10-year government bond yield, and the average annual changes in the Dow Jones Industrial Average and the S&P 500 index. Thus, if the properties had earned a return equal to interest at the statutory rate, they would have appreciated in value to $310,200 by 2005.

Lisa Fowler, a partner at Gallagher & Lindsey, the company that took over management of the parties' properties in January 2009, testified that her company managed a total of about 1500 rental units and charged a fee of six percent of the rents collected. Fowler said that the Kahn's tenants were paying rents that were generally 10 percent above market. In her opinion the residential units had been well maintained. One unit had an upgraded kitchen, and some had nice carpeting and were nicely painted. Fowler said that three of the 15 rental units were vacant, and that a fourth vacancy was anticipated. Barbara testified that she and Melvin never had any vacancies when they managed the properties. The Kahn's daughter, Sylvia, testified that Barbara painted the apartments, and strengthened the tenancies by establishing personal relationships with the tenants.

Barbara detailed expenditures for improvements to the properties, which she said were paid, along with family expenses, from collected rents. She testified that the

parties' income from the rental properties and the laundry business always exceeded their living expenses, which she estimated at $15,000 per year. She estimated that the couple spent $1,200 per month on food for meals at home, and said that they ate out once or twice a week, during the last five years of their marriage. However, she characterized their home as sparsely furnished, and said she did not buy expensive clothes or jewelry.

Melvin agreed that Barbara did not purchase expensive clothes or jewelry, but testified that their home was very well furnished, with many antiques. Melvin had previously testified that Barbara spent all of their money, "probably mainly on the children," without consulting him about the expenditures. He said that "[s]he had the checkbook and, being blind, she took advantage of it and just spent whatever she wanted to. At the end of almost every month there was nothing left." Barbara acknowledged that she and Melvin had incurred mortgage and equity line debts of more than $500,000, and that none of that money had been used to purchase their properties. Barbara had "no idea" where the money went.

Barbara also testified that their home was "awash in tapes" when Melvin moved out in September 2008. She said that she disposed of the tapes she did not give to her attorney.[2] When she was asked why she disposed of the tapes, she answered, "I just did."

The court filed a proposed decision on September 28, 2009. The court first explained that Barbara's testimony about disposing of Melvin's tapes caused it to reconsider its decision on the issue of undue influence. The court explained: "During the third trial, [Barbara's] testimony contained one surprise, and it was a big one. After months of back-and-forth between the parties as to whether [Barbara] had turned over in discovery all of the tapes she found when she cleaned out the office [Melvin] had used during the marriage, [Barbara] testified that she had found a 'bunch' of tapes but had 'disposed' of them." In light of Barbara's belated revelation, the court amended its prior decision and found that Barbara did not rebut the presumption of undue influence as to the May 2005 community property agreement.

[2] Counsel had previously filed a declaration stating that she received 6-10 cassette tapes from Barbara.

Thus, Santa Clara Avenue, Fifth Street, and the Garage Lot remained Melvin's separate properties. Of those properties, only Santa Clara Avenue had appreciated in value after the 2005 agreement was executed. By virtue of the reversal of the undue influence ruling, Barbara lost half the appreciation in Santa Clara Avenue, a sum of $75,000.

The court explained why it rejected Barbara's claims that she acquired a community property interest in Melvin's separate properties based on services she provided to those properties during the marriage (the "*Pereira/Van Camp*" claims; *Pereira v. Pereira* (1909) 156 Cal. 1; *Van Camp v. Van Camp* (1921) 53 Cal.App. 17) and her claims that she acquired an interest in those properties because community funds were used to pay for separate property expenses and improvements (the "*Moore/Marsden*" claims; *In re Marriage of Moore* (1980) 28 Cal.3d 366; *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426). The court granted Melvin a reimbursement claim of $205,000 based upon his equity in the Victorian when it was transmuted to community property in 1992. The court determined that Barbara was entitled to spousal support of $3,300 per month, and separately ordered the establishment of a trust, initially including all of the income-producing properties, to ensure that Barbara received adequate support for the rest of her life.

Both sides filed objections to the proposed decision, and Barbara moved to disqualify the judge for cause. The court filed a statement of decision in October 2009, responding to the parties' objections and elaborating further on its reasoning. The court increased Barbara's monthly support from $3,300 to $3,400.

The statement of decision also rejected Barbara's allegations of bias and prejudice. The court added a footnote stating that this case "is one of the two or three most shocking examples of wasteful family court litigation seen by this bench officer in nearly three years of service to the department. . . . The policies reflected in section 271 [attorney's fees as sanctions] can only be realized if family law practitioners realistically assess the merits of their respective cases and seek an informed resolution rather than advance their

respective client's feeling of entitlement regardless of legal (as opposed to moral or emotional) merit."

The judge filed a verified answer to the motion for disqualification, followed by an order striking the motion. Barbara petitioned this court for a writ of mandate disqualifying the judge. We summarily denied the petition.

Melvin filed a notice of intention to set aside portions of the "judgment," and a declaration of counsel stating that "[f]rom the moment [she] began representing [Melvin], it became very clear to me that the court did not like my client and was biased against him. The entire record of this case reflects the court's poor opinion of [Melvin] as the Court itself points out. The contents of the Proposed Decision and the Statement of Decision did not change my opinion of the court's negative opinion of [Melvin]."

The court filed an amended statement of decision and a judgment on November 19, 2009. The amended statement of decision, like the prior statement of decision, omitted observations about attorney's fees as sanctions the court originally expressed, but otherwise contained the language we have quoted above from the prior decisions without material change. The 30-page proposed decision expanded to 44 pages in the amended statement of decision.

The judgment confirmed Santa Clara Avenue, Fifth Street, and the Garage Lot to Melvin as his separate property, and declared the Home and the Victorian to be community property. The Home was awarded to Melvin with an equalization payment of $6,000 to Barbara. The Victorian was ordered to be sold, and the net proceeds distributed in the following priority: "(a) to cover capital gains taxes, (b) to pay [Melvin's] $205,000 reimbursement claim, and (c) to pay any and all community property credit card debt," with "any remainder [to] be held in a blocked account pending resolution of outstanding disputes regarding attorney's fees and litigation costs." Barbara's *Pereira/Van Camp* and *Moore/Marsden* claims were denied, but she was awarded monthly support of $3,400 effective November 1, 2009. Pending sale of the Victorian, she would receive 60 percent of the net rental proceeds from the properties up to $3,400 per month.

Provisions for the trust that would ensure Barbara's lifetime support evolved based upon the parties' counter proposals.[3] When the court filed its statement of decision, it was "unclear as between [Santa Clara Avenue] or [Fifth Street] which should be in the trust." The amended statement of decision ordered that the corpus be Santa Clara Avenue, and provided guidance as to how the trust should be managed to "protect [Barbara] in the event that inflation, unexpected medical costs, the need for long-term care or other contingencies might make the current award insufficient." If the trust was unable to pay Barbara $3,400 in any month, Melvin was responsible for the difference. The court "reject[ed] the proposal that [Melvin] should manage the trust property and be responsible for the full monthly payment. Given the history of these parties, that only invites trouble. The court would order an annuity or life insurance policy before it would be comfortable leaving [Melvin] to manage the trust corpus."

On December 4, 2009, Barbara filed a timely notice of intent to move for a new trial. The court filed its order denying her motion for new trial on February 11, 2010. Barbara timely appealed from the judgment.

II. DISCUSSION

A. The *Pereira/Van Camp* Claims

"[I]n California, property acquired prior to marriage is separate, while property acquired during the marriage is presumed community property. [Citations.] Income from separate property is separate, but the fruits of the community's expenditures of time, talent, and labor are community property. [Citations.] [¶] . . . [¶] Where community efforts increase the value of a separate property business, it becomes necessary to quantify the contributions of the separate capital and community effort to the increase. . . . [¶] . . . [¶] . . . [T]he necessity of apportionment arises when, during marriage, more than minimal community effort is devoted to a separate property business. . . . [¶] The community is entitled to the increase in profits attributable to the

[3] Titles of pleadings concerning the trust, such as "Petitioner's Response to Respondent's 'Plan C' Proposal During November 5, 2009, Hearing," and "Respondent's Response to Petitioner's Response to Plan C," give a feel for how the case was litigated.

community endeavor. [Citations.] Accordingly, courts must apportion profits derived from community effort to the community, and profits derived from separate capital are apportioned to separate property." *In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 850-852, fn. omitted (*Dekker*).) Findings with respect to apportionment must be affirmed if they are supported by substantial evidence. (*Id.* at p. 849.)

"California courts have developed two alternative approaches to allocating business profits. The *Pereira* approach is to allocate a fair return to the separate property investment and allocate the balance of the increased value to community property as arising from community efforts. [Citations.] The *Van Camp* approach is to determine the reasonable value of the community's services, allocate that amount to community property and the balance to separate property. [Citations.] [¶] . . . [Courts] have endeavored to adopt that formula which is most appropriate and equitable under the circumstances. [Citation]. The court is not bound to adopt a predetermined percentage as a fair return on separate business capital, nor need it limit the community interest to a salary as reward for a spouse's efforts, but may select whichever formula will effect substantial justice between the parties." (*Dekker, supra*, 17 Cal.App.4th at pp. 852-853, fns. omitted.)

Additionally, there is a "fundamental distinction between the total community *income* of the marriage, i.e., the figure derived from the *Van Camp* formula, and the community *estate* existing at the dissolution of the marriage. The resulting community estate is not equivalent to total community income so long as there are any community *expenditures* to be charged against the community income. A long line of California decisions has established that 'it is presumed that the expenses of the family are paid from community rather than separate funds [citations] [and] thus, in the absence of any evidence showing a different practice, the community earnings are chargeable with these expenses. [Citations.]' [Citations.] This 'family expense presumption' has been universally invoked by prior California decisions applying either the *Pereira* or *Van Camp* formula. [Citations.] Under these precedents, once a court ascertains the amount of community income, through either the *Pereira* or the *Van Camp* approach, it deducts

the community's living expenses from community income to determine the balance of the community property." (*Beam v. Bank of America* (1971) 6 Cal.3d 12, 20-21 (*Beam*).)

This approach has since been discredited insofar as it directs the deduction of community expenses when applying the *Pereira* formula. (*In re Marriage of Frick* (1986) 181 Cal.App.3d 997, 1019 (*Frick*).) Since the spouse claiming apportionment in *Beam* conceded that she could not prevail under the *Pereira* formula, the court's discussion of that formula was nonbinding dicta. (See *id.* at p. 1019, fn. 12.) However, *Beam* remains good law to the extent that it requires deduction of community expenses when a court applies the *Van Camp* formula, and Barbara does not argue otherwise.

Consistent with the foregoing authorities, the court ruled that Barbara had the burden under *Pereira* "[1] of proving that a portion of the pre-transmutation appreciation of any of [Melvin's] separate properties [was] attributable to community effort as opposed to general market conditions and [2] of proving the amount of the appreciation to be attributed to such efforts." Under the *Van Camp* formula it was her "burden of proving that the reasonable compensation for management of the properties exceeded family expenses." The court explained at length why it concluded that she had not met either burden.

The court rejected Mills's expert testimony as "based on unreasonable assumptions unsupported by the record," and ultimately "too speculative to be given any weight." As for Mills's *Pereira* calculations, "it was never clear why Mills used interest rates, government bonds and the like to measure the return that might be attributable to the increase in value of the underlying real estate. There are presumably numerous sources available to see what returns have been earned on California real estate (and Bay Area real estate in particular) over the years, but Mills never explained why these were not available, could not be used or might be inappropriate."

As for Mills's *Van Kamp* testimony, the court wrote:

"[T]here was no credible effort to relate the work [Barbara] in fact performed to the six different [salary data] categories he used to value her services, and it was totally arbitrary to assume that she spent 10 hours a week for 52 weeks a year in each of the six categories from

1961 through 1981 and then 10 hours a week in the remaining four categories from 1981 through the date of separation. These categories and time assumptions were used without any regard for the number of units the parties in fact managed at different time periods, how the resulting fluctuations might relate to full time or part time work, etc. The time attributions were no more than a guess. Third, there was no attempt to use other information available in the record to value [Barbara's] services. For example, there was evidence that professional property management firms charge 6% of gross rents as a fee for a bundle of services [Barbara] in fact provided. That factor could have been applied to historical rents and used as a measure for a portion of the parties' efforts and then interviews or other methods rooted in the parties' testimony might have been used to value the balance. Instead of trying to assemble a detailed factual record for Mills to work with, [Barbara] had him simply make a series of gross assumptions and apply some rudimentary techniques to those assumptions.

"19. As if these difficulties were not enough, this record presents the additional problem of how to apply the family expense presumption. As already noted, even if one could value [Barbara's] labors, the sum total of those labors over the length of the marriage does not equate to the community interest as of the date of separation. At best, one would have a figure for *gross* community earnings and need to deduct from that the family expenses presumably paid from those earnings. This was not done, or at least not in any credible fashion. Instead, [Barbara] simply estimated that $15,000/year was a good approximation of the couple's average living expenses over the course of the marriage. There was no credible explanation as to why the court should credit her $15,000/year estimate in this context. This is especially true when one notes that Barbara uses the $17,674/year developed by Mills as the average community earnings — leaving a net margin of only $2,674/year. The narrowness of that spread between the estimate of the value of community income and the estimate of family expenses is significant. It illustrates how sensitive the exercise is to whatever underlying assumptions may be used. If one posits family expenses consistent with either of [Barbara's] recent estimates of the living expenses for her alone (and remember, she testified to being frugal), either of those annualized figures would be higher than the Mills figure for 2008 community earnings ($38,539). In short, no serious effort was made at trial to develop a picture

of this family's living expenses consistent with any of [Barbara's] recent [income and expense declarations], to discount that number in some fashion to derive an estimate for each of the 48 years in question and then to compare that year-by-year expense data to a reasonable year-by-year estimate of income attributable to the skill, efforts and industry of the spouses."

The court further noted that "Mills made no use of the parties' tax returns, and this is said to be explained by the fact that the returns for the years prior to 1984 were unavailable. What is unexplained, however, is why the tax returns since 1984 were not used. They were available and could have been used at least as a check on his assumptions for the latter years. If that check supported the reasonableness of his assumptions and methods for the period of 1985 to 2005, one might be more willing to credit his methodologies for the earlier period. In other words, the fact that good data is available for 'only' 20 of the 40 years is not a good argument for ignoring all case-specific data in favor of a far more generalized set of assumptions and methods."

The deficiencies in Mills's and Barbara's testimony were not cured by property manager Fowler's testimony that "[Barbara's] efforts resulted in rental income that was (at least in recent years) approximately 10% above market. This, too, might have been a way to value [Barbara's] contributions above the 6% an ordinary property manager might charge. But as with some of the other alternatives, such an approach might well have resulted in insufficient community income to offset family expenses. [Barbara] testified that there was never a year when community expenses exceeded 'the money coming in,' but that bare fact does not help one determine whether there were years when community expenses did not exceed *community* 'money coming in' – or in the years when there may have been 'excess community funds' how much they were."

The court determined, in sum, "that [Barbara] failed to carry her burden of proving (a) that a portion of the pre-transmutation appreciation of any of [Melvin's] separate properties was attributable to community effort as opposed to general market conditions, (b) that, if there was such a portion, the actual amount of the appreciation that should be attributed to such efforts, (c) what was the value of the community's efforts in managing the properties, (d) the

amount by which that value exceeded community expenses in any given year of the time period as a whole, or (e) where any 'excess community earnings' went."

The court thus provided many cogent reasons for rejecting Barbara's apportionment claims. Barbara submits that she presented substantial evidence that could have supported a different result, but that argument is unavailing on appeal. The court weighed her evidence and found it wanting. She "in effect ask[s] us to reweigh the evidence, which is not our province to do." (*County of Los Angeles v. Kling* (1972) 22 Cal.App.3d 916, 921.)

Barbara contends that she was erroneously assessed the burden of proof, but as the party asserting claims against Melvin's separate properties she was properly required to substantiate them. (Evid. Code, § 500 [party generally has the burden of proving each fact essential to a claim for relief].) Barbara argues Melvin should have borne the burden of proof because he "controlled the finances" during the marriage. However, courts do not shift the burden of proof in response to such a general and unspecified claim. Rather, they require the party who otherwise would have the burden of proof to show that information is not available to them. (See *Estate of Kampen* (2011) 201 Cal.App.4th 971, 1001.) Here, the court identified evidence available to Barbara such as Alameda real estate data, tax returns, and income and expense declarations that might have supported her position. Under the circumstances, Melvin cannot be held responsible for her failure of proof.

Barbara suggests that, if the court deemed her showings under *Pereira* and *Van Camp* to be inadequate, it was required "to substitute its own calculations" to determine the apportionment to which she was entitled. Here again, the court adequately addressed her claim: "[Barbara] has suggested, in effect, that the court should use the information presented by the forensic economist, the testimony of the parties and the income tax returns and other exhibits as a tool kit and simply apply the most reasonable inferences and techniques to fashion a result that will, in the words of the *Beam* court, achieve 'substantial justice between the parties.'[4] While that may be a tempting invitation, it fundamentally

[4] *Beam*, *supra*, 8 Cal.3d at p. 18, observed that " 'no precise criterion or fixed standard' " governs apportionment, and stated, in discussing *Pereira* and *Van Camp*, that

misconstrues the role of the court and is an extremely broad reading of the passage quoted in *Beam.* In any given situation, the law imposes on one party or the other the burden of proof and it is for that party to carry that burden through the presentation of sufficient, admissible evidence. While the trier of fact may from time to time credit a party's presentation but adjust certain portions to make it more reasonable, it is an entirely different matter to use a party's presentation as a tool kit to construct whatever result seems 'just.' To permit such latitude would be to relieve the party with the burden of proof from carrying that burden and instead invite the court to use whatever is in the record, no matter how limited, to engineer on its own initiative whatever result it may wish."

Barbara emphasizes that in this case, unlike many involving *Pereira/Van Camp* claims, both spouses, not just one, provided community services to a separate property "business" – the management of Melvin's rental properties. However, she did not seek apportionment based on the value of Melvin's community property contribution in addition to her own, and does not explain how both parties' participation in the business should have changed the outcome.

Barbara's apportionment arguments appear at bottom to rest on sheer incredulity that the community could acquire no equity interest in the separate property she and Melvin spent a good deal of their time managing. She maintains that the court's *Pereira/Van Camp* determination "relegated [her] to the status of an indentured servant who slaved for [Melvin] for 48 years in return for room and board," and that the result cannot be squared with "California's partnership model of marriage." (*Dekker*, *supra*, 17 Cal.App.4th at p. 851.) But to borrow from the trial court, Barbara cannot prevail based on "feelings of entitlement" that may have "moral or emotional . . . merit." She must demonstrate that the court committed reversible legal error, and has failed to do so with respect to her apportionment claims.

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a court " 'may select [whichever] formula will achieve substantial justice between the parties.' "

B. The *Moore/Marsden* Claims

Barbara asserted *Moore/Marsden* claims seeking reimbursement of community funds used to pay off a mortgage on Fifth Street, and mortgages on the Home and the Victorian prior to their transmutations to community property. She also sought reimbursement of community funds used to pay for improvements to Santa Clara Avenue and Fifth Street, and improvements to the Home and the Victorian before their transmutation. She challenges the court's conclusion that her claims were "not well-founded."

In re Marriage of Moore, supra, 28 Cal.3d 366 and *In re Marriage of Marsden, supra,* 130 Cal.App.3d 426, lead a line of cases "giving the community a pro tanto interest in separate property – real property, typically – purchased, paid down, or improved with community funds." (*Patrick v. Alacer Corp.* (2011) 201 Cal.App.4th 1326, 1344.) "Generally, '[w]hen community property is used to reduce the principal balance of a mortgage on one spouse's separate property, the community acquires a pro tanto interest in the property. [Citations.] This well-established principle is known as "the *Moore/Marsden* rule." ' " (*In re Marriage of Nelson* (2006) 139 Cal.App.4th 1546, 1552.) "Where community funds are used to make capital improvements to a spouse's separate real property, the community is entitled to reimbursement or a pro tanto interest under the *Moore/Marsden* rule." (*In re Marriage of Allen* (2002) 96 Cal.App.4th 497, 501, citing *In re Marriage of Wolfe* (2001) 91 Cal.App.4th 962, 972.) The court's factual findings on *Moore/Marsden* issues are reviewed for substantial evidence. (See *Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1421.)

The court began its analysis by pointing out that Barbara's claims rested largely on the false premise that all of the rents collected by the community "property management business" were community income. The court observed, "This is like saying that the Gallagher & Lindsey business income is the rent it collects for its clients. Not so. The rental receipts it collects are the income of its clients, while G&L's income is the fees it is paid by those clients." As another court has stated, "Assuming the care and maintenance of income properties owned by [the husband] to be a 'business,' it is not the profits of the

business, but only the ascertained earnings of the [husband] from his individual efforts in managing, laboring on and caring for such property, in the nature of salary, wages or the equivalent thereof, which would be community property." (*Cozzi v. Cozzi* (1947) 81 Cal.App.2d 229, 232.)

The rents collected from Santa Clara Avenue and Fifth Street, Melvin's separate properties, were also his separate property. (Fam. Code, § 770, subds. (a)(1), (a)(3).) Rents from the Victorian were likewise not community property until the Victorian was transmuted to community property in 1992. The community had no rental income apart from the post-1992 rents from the Victorian.[5] Rather, the income that could be imputed to the community was based upon its earnings for the "property management business." The community had no other sources of income during the marriage other than money Barbara earned from employment before 1964, and earnings generated by the laundry business before 1982.[6]

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[5] Although a cottage behind the residence at the Home also generated community rental income after transmutation of the Home in 1991, that income is not at issue as it was apparently always given to Barbara. Barbara testified that she deposited $950 per month in rent from the cottage, and her social security payments, into her own separate account. When she was asked whether the cottage rents were Melvin's "gift to you," Barbara answered, "He gave that to me, yes. He allowed me to have it."

[6] With respect to the laundry business income, the court stated: "The role of the Laundromat evidence in this case has never been entirely clear. It is undisputed that the parties operated a Laundromat business up until the early 1980's when it was sold. Presumably this was a community business even though it may have operated on real property owned by [Melvin]. When it was sold, the community may have monetized that community asset, and one could inquire as to what became of those proceeds. However, the court does not know the sale price or how the proceeds were handled. Instead, it appears that this issue was brought up simply to underscore another aspect of [Barbara's] contribution of physical labor during the marriage. That labor, however, presumably resulted in income from the business that would have gone to cover a portion of family expenses or to increase the value of the business, which would have been captured at the time of sale. Either way, there is no evidence of excess income from the business (that is, community income in excess of family expenses) or of sale proceeds to trace. Absent one or the other, the Laundromat evidence becomes irrelevant."

The court separately addressed the community contributions to each of the properties in explaining why Barbara was entitled to no reimbursements, but in essence it rejected her claims because Barbara had not established that any of the allegedly reimbursable expenditures were made with community funds rather than the rents earned from Melvin's separate properties. As with her *Pereira/Van Camp* claims, she again failed to overcome the family expense presumption and show that community income exceeded community expenses.

The court's findings were supported by substantial evidence. As explained above, the community income was not measured by all the rents received as argued by Barbara. Melvin's brief asks, if community income exceeded community expenses, "where is the excess? There was no cash to divide." He has a point. The parties borrowed over $500,000 against their community properties, and ended up with no substantial assets other than the real estate they bought in the 1960's. Barbara acknowledged at trial that the mortgages were not incurred to purchase the properties, and she had "no idea" where the loan proceeds went. It thus appears that the parties' community expenses were greater than *all* of their combined income, whether separate or community.

In her discussion of *Moore/Marsden* issues, Barbara makes passing reference to the rule that "[p]ayments made from a commingled source are presumed community property payments unless traced to a separate property source." She does not elaborate on the point except to state that "[t]he testimony at trial was the parties had one joint account after marriage, into which all of the money went." This statement appears in another section of her brief on a different issue, but is not supported by any citation to the record.

The court recognized that commingling of community and separate income was a possibility after transmutation of the Victorian in 1992, but found that Barbara had failed to prove that commingling occurred. It appeared to the court that "the revenues and expenses related to the Victorian were not separately accounted for and separate bank accounts were not maintained segregating the transactions relevant to the Victorian. [Barbara] made no attempt, however, to show what accounts (if any) were infected by

commingling. Her view seems to be that, at this point, all accounts must be viewed as community accounts and [Melvin] had the burden of proving that, as to any past transaction, it was a separate property as opposed to a community transaction. The court finds that [Barbara] needed to do more to shift the burden to [Melvin] as to any historical transaction she might wish to challenge."

Barbara cannot effectively challenge these factual findings without citing to the appellate record. (See Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) ¶ 9:36, pp. 9-12 – 9-13 (rev. #1 2011) [when opening brief fails to support arguments with appropriate citations to the record, court may treat the argument as waived].) Moreover, the trial testimony was not that "the parties had one joint account after marriage, into which all of the money went." When Barbara was asked about sources of deposits into an account she had maintained in her name alone, she answered, "From money that either [Melvin] gave me or from . . . another account that we had. We transferred money back and forth all the time for some reason. And it was . . . even confusing to [their accountants]. They told me that. Because things got paid out of this account or that account, money got moved from here to there. Not by me."

There are no grounds to overturn the *Moore/Marsden* determinations.

C. Other Arguments on the Merits

(1) Melvin's Reimbursement as to the Victorian

Barbara argues that the court erred when it granted Melvin a $205,000 reimbursement from the sales proceeds of the Victorian as compensation for his equity when it was transmuted to community property in 1992. (See generally *In re Marriage of Geraci* (2006) 144 Cal.App.4th 1278, 1286 [separate property contributions to community property are reimbursed before division of remaining community property].) She argues that he could not obtain this reimbursement without tracing the funds used to purchase the Victorian in 1969 to a separate property source. Her argument is based on Family Code section 2640, subdivision (b), which provides in relevant part: "In the division of the community estate . . . [a] party shall be reimbursed for the party's

contributions to the acquisition of property of the community property estate to the extent the party traces the contributions to a separate party source."

However, as we stated in the preceding section of our discussion, the court had substantial evidence from which to find that community expenses exceeded community income throughout the marriage, a fact that, as Barbara concedes, obviates the tracing obligation. She recognizes that, if community expenses were greater than community income, "any money [Melvin] took to purchase the Victorian 'must have been' his separate property." " 'Evidence that there was no excess of community income over living expenses is as effective to prove that all assets of the estate are separate property as a specific showing from which separate source each asset flowed.' " (*Morris v. Berman* (1958) 159 Cal.App.2d 770, 793.)

Barbara notes that property purchased with funds from an account in which separate and community property are commingled is presumed to be community property (see *Beam*, *supra*, 6 Cal.3d at p. 23, discussing *See v. See* (1966) 64 Cal.2d 778, 783), but we have previously explained why Barbara has no viable commingling argument.

The court did not err in granting Melvin's reimbursement claim.

(2) Inability to Object to the Court's Rulings

Barbara contends that the court's proposed decision, statement of decision, and amended statement of decision were "materially different," and that she was improperly deprived of an opportunity to object to the latter two. However, the decisions were consistent with respect to the issues raised in this appeal. The text expanded as the court's thinking evolved, but the decisions consistently rejected Barbara's *Pereira/Van Camp* and *Moore/Marsden* claims, and granted Melvin's reimbursement from the sale of the Victorian. Barbara was given ample opportunity to argue all facets of her case below and fully availed herself of that opportunity, filing among other things a 41-page closing argument, 42 pages of objections to the proposed decision, and a 36-page memorandum of points and authorities in support of her motion for new trial.

The court answered Barbara's "three decisions" argument when it denied her new trial motion: "As to two of the 'decisions,' there was nothing unusual: the court issued a

tentative decision and, after receiving objections and proposals from the parties, issued its Statement of Decision. In this respect, the court followed the process set forth in the Code. (C.C.P. § 632.) The 'third' decision was the Amended Decision issued coincident with the judgment. The Amended Decision made some relatively minor adjustments, in some instances going back to the original tentative. . . . As noted by [Barbara] in the context of her new trial motion, the court has inherent power to modify any interim order or decision . . . , and the Amended Decision is simply an application of that principle. There was nothing 'irregular' in what occurred here with respect to the so-called 'three decisions.' "

Barbara does not identify any error in this reasoning, or any prejudice caused by the sequence of decisions. We therefore reject the "three decisions" argument.

(3) Whether the Result was Inequitable

Barbara asserts broadly that "the trial court failed to do equity." We disagree. To once again borrow the trial court's language, "even a justifiable feeling of entitlement is no substitute for proof consistent with the precepts of the Family Code."

In her opposition to Melvin's *Pereira/Van Camp* briefing below, Barbara wrote: "In the end, the Court should achieve substantial justice by awarding [Santa Clara Avenue] to [her] as her separate property, and [Fifth Street] to [Melvin] as his separate property. . . . A less permanent solution, but one that would guarantee [Barbara] a stream of income during her life, is to award [her] a life estate in [Santa Clara Avenue] and a portion life estate in [Fifth Street] so that she has sufficient spousal support for the remainder of her life."

The court took care to ensure that Barbara would have adequate spousal support for life. Although it did not award her an ownership interest in Santa Clara Avenue, it ordered that it be placed into a trust and managed so as to meet Barbara's current and future needs. It was apparent to the court that the "support award need[ed] to be secured so that [Barbara] will receive support if [Melvin] predeceases her and chooses to leave his estate to others. This fundamental fact has been obvious from the very beginning of the case, and throughout the litigation all the property and reimbursement disputes have played out

against this backdrop and the realization that — whatever the outcome of those disputes — the economic benefit flowing from these properties would be shared. The only issue has been the extent [Barbara] would share that benefit as an owner of a large portion of the assets or through spousal support secured by [Melvin's] larger asset base or by some combination of the two."

Although Barbara did not achieve the result she sought, the result the court reached was close enough to the one she envisioned to belie her allegations of gross unfairness.

D. Judicial Bias

Barbara moved to disqualify the judge for bias on the grounds that he prejudged the case, and "did not treat the litigants equally or give impartial consideration of the evidence." Her motion was supported by the declaration of her counsel stating, among other things, that in her 16 years of practice she had never before challenged a judge for cause, and was "do[ing] so now with great regret." The allegations of judicial bias are renewed on appeal. They are without merit.

Melvin's threshold position is that Barbara's claims of bias are not cognizable in this appeal because her writ petition on the subject was her sole remedy and it was unsuccessful. We disagree. Code of Civil Procedure section 170.3, subdivision (d) provides that an order regarding disqualification of a judge is not appealable and may be reviewed only by a writ of mandate. However, Barbara preserved her right to argue the issue of bias on appeal by petitioning for such a writ, and our summary denial of the petition did not establish law of the case on this issue. (See *People v. Brown* (1993) 6 Cal.4th 322, 336 [defendant whose Code Civ. Proc., § 170.3, subd. (d) petition was summarily denied could raise constitutional due process claim of judicial bias]; see also Code Civ. Proc., § 170.3, subd. (b)(2)(A) [a claim that a judge is personally biased or prejudiced against a party is not waivable]; compare *In re Sheila B.* (1993) 19 Cal.App.4th 187, 194-195 [summarily denied petition did not raise disqualification issue].)

Under Code of Civil Procedure section 170.1, "(a) A judge shall be disqualified if any one or more of the following are true . . . (6)(A) . . . (iii) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. (B) Bias or prejudice toward a lawyer in the proceeding may be grounds for disqualification." "When

reviewing a charge of bias, ' . . . the litigants' necessarily partisan views should not provide the applicable frame of reference. [Citations].' [Citation.] Potential bias and prejudice must clearly be established [citation] and statutes authorizing disqualification of a judge on grounds of bias must be applied with restraint. [Citation.]" (*Roitz v. Coldwell Banker Residential Brokerage Co.* (1998) 62 Cal.App.4th 716, 724 (*Roitz*).)

"Bias or prejudice consists of a 'mental attitude or disposition of the judge towards a party to the litigation . . . .' " (*Pacific etc. Conference of United Methodist Church v. Superior Court* (1978) 82 Cal.App.3d 72, 86 (*Pacific*). Bias is evaluated objectively by asking whether a reasonable person " ' " 'would entertain doubts concerning the judge's impartiality.' " ' " (*Hall v. Harker* (1999) 69 Cal.App.4th 836, 841 (*Hall*), disapproved on other grounds in *People v. Freeman* (2010) 47 Cal.4th 993, 1006-1007, fn. 4, and *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 349.) Neither "strained relations between a judge and an attorney" (*Roitz, supra*, 62 Cal.App.4th at p. 724), nor a judge's expressions of "understandable frustration" (*People v. Brown* (1993) 6 Cal.4th 322, 337; *Hall, supra*, 69 Cal.App.4th at p. 843) establish bias.

Code of Civil Procedure section 170.2, subdivision (b) states, with exceptions not pertinent here (see *Roth v. Parker* (1997) 57 Cal.App.4th 542, 549), that "[i]t shall not be grounds for disqualification that the judge . . . [h]as in any capacity expressed a view on a legal or factual issue presented in the proceeding." Thus, " '[w]hen the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and the evidence given during the trial of an action, it does not amount to that prejudice against a litigant which disqualifies him in the trial of the action.' " (*Pacific, supra,* 82 Cal.App.3d at pp. 82-83.) On the other hand, a judge who expresses opinions on the merits before hearing the evidence may be deemed to have improperly prejudged the case. (*Id.* at pp. 76-78, 84-88 [while ruling on pretrial motions, the judge wrote a letter to counsel stating "I believe the award of damages will be enormous" and "[c]ontinued litigation may prove devastating to all concerned"; this "midstream gratuitous blast" from the judge was outside the scope of his duty to rule on the matters before him].)

In his answer to Barbara's petition, the judge denied prejudgment of any part of the case. He acknowledged that "during the settlement conferences . . . I may have stated views regarding legal and factual issues. If and when I did so, it was always with the express or implied proviso that I had not yet heard the trial testimony, which would control any factual determination, and my views on the law were subject to authorities and argument that counsel might present. . . . [¶] Both in settlement conferences and on the record at motion hearings and status conferences, I did urge the parties to settle and I expressed the views recounted in footnote 35 of the Decision [describing the case as "shocking example[] of wasteful family court litigation"]. That view was and is that, given that both parties are in their eighties and have been married for close to 50 years, regardless of who won or lost the property division issues, spousal support would be dramatically affected by those rulings and adjusted so that the economic impact of the property division might not be as great as the parties believe. That states the obvious given the way Family Code section 4320 [factors to be considered in ordering spousal support] is drafted and typically applied. Further, I expressed the view that the litigation was irrational because (a) they were running up attorneys' fees that could only be satisfied by the sale of assets both parties were relying on for support in their waning years and (b) as they ran up those fees, more property would have to be liquidated and, due to the fact that most had a tax basis pegged to the 1960's, a large portion of the proceeds would then have to be paid to the IRS to satisfy the resulting capital gain tax liability. [¶] In making comments such as those above and similar remarks regarding the importance of settling the case, I was not prejudging the case but exercising what I saw (and see) as my responsibility as a bench officer to promote settlement."

We find no reason to doubt the judge's explanation. The situation here is like that in *Garcia v. Estate of Norton* (1986) 183 Cal.App.3d 413, where the defendant moved to disqualify the judge because the judge had advised in a chambers conference before trial that it "ought to settle the lawsuit because there appeared to be clear liability." (*Id.* at p. 422.) The judge denied "any bias or prejudice against any of the parties or any commitment as to the outcome," noting that his comment as to liability "was made in the

context of trying to settle the case prior to trial, an attempt he [made] with every personal injury case." (*Id.* at p. 423.) The motion for disqualification was denied, and the appellate court "agree[d] with the decision below that the facts indicate that there was no prejudice in this instance. Expressions of opinion of this nature by a judge, in what he conceives to be a discharge of his official duties, do not evidence a bias or prejudice which would prevent him from being entirely fair and impartial in the trial." (*Ibid.*)

"Repeated admonitions to 'settle the case' [or that] settlement will be in the best interest of the client indicate that the judge may have become prejudiced in the case." (*Pacific, supra*, 82 Cal.App.3d at p. 86.) However, the repeated admonitions to settle here were addressed equally to both sides, and were based on reasoned explanations as to why they both had little to gain from protracted litigation. The entreaties demonstrated no bias against Barbara, only a very dim view of the litigation as a whole. The judge's efforts to settle the case were not indicative of any prejudgment of the merits.

Nor are we persuaded that isolated statements by the judge during the third phase of the trial disclosed prejudgment of the issues. During Barbara's examination of property manager Fowler, a discussion ensued of the need to sell real estate to meet the parties' needs. The judge observed, "the fact of these parties' unfortunate situation is that they're severely cash-strapped. The properties are going to have to be liquidated . . . I have to get them an income stream." The judge later added, "it's very likely that if we don't have to liquidate properties . . . [they] are going to be placed in a trust, and the net income is going to be split on a percentage." These ruminations about ways to generate needed income for the parties did not reflect any improper predetermination of the result. At one point during Barbara's oral closing argument, the judge said, "The property division is not going to be close, and there's going to be spousal support." But when Barbara closed by saying that the judge had "been very hostile to my claims today and indicated [it] might have already figured out what it's going to do" before the submission of further briefing, the judge responded, "Look, I haven't even begun to figure out what I'm going to do."

Barbara suggests that the judge effectively ignored her apportionment and reimbursement claims. She writes: "Instead of undertaking to characterize the interests and apply the principles of equitable proportionment, the court simply awarded [her] spousal support and gave Melvin the properties. While this was an easier solution for the court, Barbara did not receive the benefit of the law." But the judge could hardly be said to have taken an easy way out in this case. He conscientiously addressed each of Barbara's arguments.

Barbara claims that the judge's remarks and demeanor during the third phase of the trial exhibited a bias against her. This contention does not withstand scrutiny.

When the judge sustained a relevance objection Melvin made and Barbara's counsel said "I apparently made you angry," the judge responded: "That's because I want to move this along. I want to get the relevant facts in. I am not going to allow either party to use this as an opportunity to get off their chest their very deep-felt, sincere feelings of how each of them believe they have been hurt and wronged. And I am telling both parties now, I understand the feelings run deep. I understand each party feels hurt. I understand all that. We're here to do business. We are identifying the property. We're trying reimbursement claims. And the fact that people were not nice to each other, the fact that people had their feelings hurt that is not relevant and this is not the forum to express those feelings. I am sorry. So ask the next question." The judge thus acknowledged being angry, explained why, and apologized. Judges are human beings who will occasionally lose their temper. Expressions of understandable frustration do not establish bias. (*People v. Brown*, *supra*, 6 Cal.4th at p. 337; *Hall*, *supra*, 69 Cal.App.4th at p. 843.)

Barbara complains that the judge was "openly scornful" during her oral closing argument when she maintained that her reimbursement claims were roughly equal to half of the total appraised value of the parties' real estate. The judge challenged her *Pereira/Van Camp* theories, stating, "If [Barbara] could manage to work another 40 years, she'd own it all. He'd have no claim at all, because her . . . claims would by that point exceed the community property value, even though he started out owning all the

real estate a hundred percent. If she could just work another 40 years, she would own outright all of it through reimbursement, on that analysis." After further exchanges, the judge said, "You keep going, she'll be paying him support pretty soon." Barbara's counsel agreed that "if, in fact, my view of things is in line with the way you ultimately rule, support for [Barbara] would not be appropriate. Maybe support for [Melvin] would be appropriate." The judge was entitled to probe Barbara's legal theories and their implications. Challenging the logic of a party's position is not indicative of bias.

Barbara's counsel declared in support of the disqualification motion that the judge repeatedly shouted at her during the phase three trial, and that spectators were "shocked by his open rudeness, hostility to our evidence and our case, and his endless lectures of me." While the decibel level cannot be gauged from the appellate record, the phase three trial transcript does not bear out the allegations of rudeness, hostility, and lecturing. The judge was impatient at times, sometimes sustaining "objections" each side might have made before they were raised, but he made even-handed evidentiary rulings and allowed Barbara to fully present her case.

Barbara submits that the judge expressed a bias against her and her counsel in the amended statement of decision when he wrote: "[T]hroughout this case it has been observed by the court *and admitted by [Barbara's] counsel* that, given the burden of proof and difficult tracing issues, she faced a steep climb on the claims she would be presenting in the third phase. The rejoinder was always that [Barbara] was prepared to meet that challenge. If the court appeared surprised, skeptical and, yes, even frustrated at times during closing, it was because after all of this effort the court actually expected a credible case that made a serious attempt to quantify community contributions on a year-by-year basis, account for the family expenses and then trace the disposition of any excess. Instead, something much less was presented." (Emphasis original.) Barbara does not deny the italicized admission, but characterizes this passage as an improper "call[ing] out of [her] and her counsel." The passage shows that the judge was not impressed with Barbara's evidence, but he was not required to be. (*County of Los Angeles v. Kling*, *supra*, 22 Cal.App.3d at p. 921 [trial court determines the weight of the

evidence]; see also *Pacific*, *supra*, 82 Cal.App.3d at pp. 82-83 [court can disparage a party's case after hearing the evidence].)

Barbara understandably focuses her bias claim entirely on the third phase of the trial, but the judge's response to her case in that phase was no more blunt and caustic than his response to Melvin's case in phase two. The judge did not find Melvin to be a credible witness. But rather than simply make that general finding, he went on to enumerate no less than nine different ways in which Melvin's testimony was unbelievable. Similarly, while Barbara objects to language in paragraph 45 of the original proposed decision that was critical of her and her case, paragraph 44 of that decision was equally critical of Melvin and his case. In discussing attorney's fees as sanctions, the court wrote:

"43. . . . While the court will entertain motions by either party on this subject, it needs to be said that neither party is blameless in this debacle. A few observations in this regard are in order.

" 44. First, [Melvin's] conduct on the witness stand has already been discussed. He was highly partisan, at best engaged in hyperbole and in fact gave false testimony. While he may have succeeded in reversing the initial ruling on undue influence due to [Barbara's] conduct, what stands out is that this man repeatedly misrepresented to his spouse his intent and actions regarding the status of his separate property. If this litigation has been marked by extended and expensive proceedings on the issues of transmutation and undue influence, that is in no small measure the result of [Melvin] purporting to transmute his separate property into community property only to do so ineffectively or otherwise renege on his promises. While it is true that from the start [Melvin] recognized [Barbara's] entitlement to long-term spousal support, as late as the last settlement conference his litigation position was that [Barbara's] right to spousal support would terminate on his passing and the court had no authority to secure its payment after his death. . . . None of this comports with his obligations under section 271.

"45. As for [Barbara], she too has issues. Foremost, of course, is the destruction of the tapes. . . . Such destruction of evidence in the course of litigation is disturbing, but even apart from the litigation, such destruction was particularly mean-spirited given the importance of such tapes to [Melvin] and undoubtedly constituted a breach of fiduciary duty. As for her various *Pereira/Van Camp* claims, they were unsupportable, resulted in a huge waste of time and resources and presented an insurmountable barrier to any kind of settlement short of trial. None of this comports with her obligations under section 271."

After the proposed decision was issued, Melvin argued that the judge was biased against *him*. The judge did not demonstrate bias by blaming both sides for what he regarded a "debacle."

III. CONCLUSION

The judgment is affirmed.

_____
Siggins, J.

We concur:

_____
Pollak, Acting P.J.

_____
Jenkins, J.